No. 84-6811

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WARREN MCCLESKEY,

Petitioner,

v.

RALPH M. KEMP,

Respondent.

On Writ of *Certiorari* to the United States Court of Appeals for The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF PETITIONER

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MOTION OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the Rules of this Court, the International Human Rights Law Group (the Law Group) moves for leave to file the attached brief *Amicus Curiae* in support of Petitioner. The Law Group is a non-profit organization of international lawyers and scholars, which, through litigation, publication, and other public activism, seeks to promote respect for human rights norms in all nations, including the United States.

By order dated October 7, 1985, this Court allowed the Law Group to file a brief *Amicus Curiae* in support of the petition for a writ of *certiorari* in this case. Having argued in favor of the propriety of review, the Law Group now moves to file a brief on the merits. In particular, *Amicus* wishes to submit for this Court's consideration the argument that the *en banc* decision below approved an admittedly racially-discriminatory system for the imposition of the death penalty, which violates peremptory norms of international law. In failing to consider international law as a relevant source of the rule of decision, the Eleventh Circuit's opinion violates the Supremacy Clause of the Constitution as interpreted. At a minimum, the decisions of this Court oblige the Eleventh Circuit to consider international standards in determining whether Petitioner's sentence was "cruel and unusual" within the meaning of the Eighth Amendment.

Amicus also brings a unique institutional perspective to these proceedings. Between 1980 and 1984,

the Law Group sought to litigate the very issues of race discrimination raised in this case before the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States. On October 3, 1984, the Commission held the Law Group's petition inadmissible on certain procedural grounds and in particular on the representation of the United States that U.S. courts should be allowed to consider the Law Group's data and argumentation. *Amicus* files this brief in order to lay before this Court these legal and empirical submissions.

Amicus is not aware of any other presentation of these data or arguments to this Court. Counsel for Petitioner has consented to the filing of this brief. *Amicus* sought the consent of counsel for Respondent who declined to provide it, necessitating this motion.

Respectfully submitted,

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August 21, 1986

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BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The International Human Rights Law Group is a non-profit organization of international lawyers and scholars which seeks to promote the observance of international human rights norms by providing legal assistance and information to individuals and groups on a *pro bono* basis; representing clients in international forums; and participating *amicus curiae* in U.S. litigation involving international human rights norms.

The Law Group respectfully submits and intends to demonstrate that this case requires consideration of relevant human rights law.

The Law Group also has a unique and direct institutional stake in the resolution of this case. In 1980, the Law Group petitioned the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States (the Commission), to declare that capital sentences in the United States are imposed in a racially discriminatory manner. In particular, the Law Group argued that the death penalty is imposed disproportionately on those defendants the victims of whose crimes are white and that such discrimination based upon the race of the victim was in violation of treaties to which the United States is a party. After receiving statistical evidence similar to that presented below by Petitioner herein, the Commission held the Law Group's petition inadmissible on procedural grounds, and effectively deferred the Law Group's international claims pending an authoritative disposition of the issue by American courts.

The Law Group submits this brief in order to lay before this Court the race discrimination data submitted to the Commission, and to demonstrate that the *en banc* court below failed to construe the Georgia death penalty statute consistently with binding international law, thereby committing reversible error.

SUMMARY OF ARGUMENT

With remarkable candor, the *en banc* Court of Appeals for the Eleventh Circuit accepted the factual findings of Petitioner's studies, namely that no factors other than race could account for the marked increase in capital sentences among those defendants whose

victims were white. Indeed, the court below expressly "assum[ed] the validity of the research" and acknowledged "that it proves what it claims to prove." *McCleskey v. Kemp*, 753 F.2d 877, 886 (llth Cir. 1985) (*en banc*). The conclusion as a matter of law that this evidence established no violation of the Eighth and Fourteenth Amendments to the U.S. Constitution does not exhaust the legal analysis the court was required to undertake. In particular, the *en banc* court failed to consider international law as a pertinent source of the rule of decision. Under *The Paquete Habana*, 175 U.S. 677 (1900) and its progeny, the Georgia death penalty statute should have been considered in light of the peremptory norm of international law condemning racial discrimination—a customary norm to which the United States is bound beyond peradventure. The failure to consider an applicable source or guarantor of Petitioner's rights is reversible error. At a minimum, the case should be remanded to the Eleventh Circuit Court of Appeals for its analysis of the limits imposed by this international obligation on the discretion of State officials to administer the death penalty.

In addition, under *Trop v. Dulles*, 356 U.S. 86 (1958) and its progeny, the Eleventh Circuit should have consulted international standards in determining the contours of the Eighth Amendment's ban on cruel and unusual punishment.

Confining itself to the argument that each of Questions Presented 1 through 5 should have been considered in light of applicable international law,[1]

[1] Although the international issues raised by *Amicus* were not presented to the courts below, this Court has established that

Amicus offers no opinion as to the circuit court's disposition of purely domestic legal issues.

ARGUMENT

I. DATA SUBMITTED TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND TO THE COURT BELOW ESTABLISH THAT THE DEATH PENALTY IS IMPOSED IN A RACIALLY DISCRIMINATORY MANNER IN THE STATE OF GEORGIA.

On August 6, 1980, *Amicus* submitted a petition to the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States, alleging that the United States imposed the death penalty in a racially discriminatory manner. The data submitted to the Commission established a pronounced pattern of racially-based disparities in death sentencing based on the race of the victim. In particular, the evidence showed that a person convicted in the State of Florida of murdering a white person was ten times more likely to receive the death penalty than one convicted of murdering a black person.[2] In

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it has the power to consider relevant issues raised in a case "in the interest of justice," irrespective of whether those issues were previously raised, *Wood v. Georgia*, 450 U.S. 251, 265 n. 5 (1981). The exercise of that power is especially appropriate in capital cases. *Eddings v. Oklahoma*, 455 U. S. 104 (1982). *See also, Vance v. Terrazas*, 444 U.S. 252 (1980); *Procunier v. Navarette*, 434 U.S. 555, 559-60 n. 6 (1978); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320-21 n. 6 (1971).

[2] The data are described in the affidavit of Professor William J. Bowers, which is attached hereto in the Appendix. The Florida data appear on pp. 2a and 5a.

Texas, the ratio was eighteen to one.[3] In Georgia, where this litigation arose, it was twelve to one, a figure which reinforces the conclusions of the study submitted by Petitioner herein. More specifically, the Law Group's statistician, Professor William Bowers of Northeastern University, produced the following tabulation:

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-FURMAN STATUTE THROUGH 1977[a]

Race of Offender	*Estimated Number of Offenders*[b]	Persons Sentenced to Death	Probability of a Death Sentence
White	1082	41	.038
Black	2716	49	.018
Race of Victim			
White	1265	76	.060
Black	2529	25	.005
Offender/Victim Racial Combinations			
Black Kills White	258	37	.143
White Kills White	1006	39	.039
Black Kills Black	2458	12	.005
White Kills Black	71	2	.028
All Offenders	3798	90	.024

[a] *Data Sources:* Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied

[3] *Id.*, at pp. 4a and 7a.

by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicide from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Dealth Penalty, Atlanta, Georgia.

[b] The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1,2).

Thus, although black defendants on average were *less* likely than white defendants to receive the death sentence (.018 versus .038), black defendants who killed white people were more likely than any other group to receive that sentence *by several orders of magnitude*. And when the data are controlled for defendant's race, as noted, the defendant of either race who kills a white person is twelve times more likely to be sentenced to death than the defendant of either race who kills a black person (.060 versus .005).

In the proceedings before the Inter-American Commission, the United States never challenged the validity of these data or the statistical methods employed to produce them. Rather, the United States opposed the petition almost exclusively on the grounds that domestic remedies for the redress of such discrimination had not been exhausted, despite the denial of *certiorari* in *Spinkelink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 404 U.S. 976 (1979). The United States assured the Commission that U.S. courts, including this Court, remained receptive to evidence demonstrating the fact and extent of discrimination, and that they would respond fully and

fairly to any such demonstration. Opposition of the United States, Case 7465, Inter-American Commission on Human Rights (June 16, 1981). In light of this representation and on other procedural grounds, the Commission denied the petition on October 3, 1984, noting that the statistical evidence submitted was more appropriately directed to a domestic court in each individual case.

The Law Group's data, unchallenged and stark as they are standing alone, become especially compelling in light of other consistent and sophisticated demonstrations of the same phenomenon, including the Baldus study in the instant litigation and multiple reports in the scholarly literature. *See e.g.*, Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, 18 U.C. DAVIS L. REV. 1275 (1985); Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985); Baldus, *et al.*, *Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons From Georgia*, 18 U.C. DAVIS L. REV. 1375 (1985). To *Amicus*'s knowledge, the only sustained attack on any of these studies is the *en banc* court's treatment of the Baldus study in the decision below. Though lengthy, that attack suffers from inconsistency[4] and an apparent un-

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[4] Despite its apparent rejection of the Baldus data in parts of its opinion, the *en banc* court was also willing to "assume the validity of the research." 753 F.2d at 886, acknowledging "that it proves what it claims to prove." *Id.*

familiarity with rudimentary mathematics.[5] The evidence remains persuasive that there exists a marked, significant disparity in the susceptibility of certain categories of defendants to the ultimate sanction and that that disparity is determined by race. The values placed on white and black lives in Georgia are demonstrably unequal.

II. THE EXISTENCE OF RACIAL DISCRIMINATION AS ACKNOWLEDGED BY THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT *EN BANC* VIOLATES A PEREMPTORY NORM OF INTERNATIONAL LAW.

The right to be free from official government-sponsored discrimination on the basis of race is so universally accepted by nations as to constitute a peremptory norm of international law.[6] It is included

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[5] For example, the Eleventh Circuit focused on the ".06" disparity by race of victim in overall death sentencing rates, as reported by Baldus. It consistently viewed this as a six percent disparity, 753 F.2d at 896, 899. But the figure is in fact a six *percentage point* disparity, raising the overall death sentence rate from .05 to .11, a *percentage* increase of 120%, not 6%.

Petitioner and other *Amici* offer a thorough critique of the Eleventh Circuit's statistical acumen. *See* Motion for Leave To File Brief *Amici Curiae* and Brief *Amici Curiae* For Dr. Peter W. Sperlich, Dr. Marvin E. Wolfgang, Professor Hans Zeisel and Professor Franklin E. Zimring in Support of the Petition for Writ of Certiorari, filed herein on June 27, 1985.

[6] A peremptory norm of international law is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, *entered into force*, January 17, 1980, U.N. Doc. A/Conf. 39/27 (1969), *re-*

in such fundamental texts as the Charter of the United Nations[7], and the Charter of the Organization of American States,[8] both of which are treaties ratified by and binding upon the United States. Similar prohibitions are found in every comprehensive international treaty pertaining to human rights[9] and in

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printed in 63 AMERICAN J. INT'L L. 875 (1969), 8 INT'L LEG. MAT. 679 (1969). Although the Vienna Convention has been signed but not ratified by the United States, the Department of State, in submitting the Convention to the Senate, stated that it "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. (1971) at 1.

[7] U.N. Charter, *signed* June 26, 1945, *entered into force* October 24, 1945, 59 Stat. 1031, T.S. No. 933, at Article 55(c).

[8] O.A.S. Charter, *signed* April 30, 1948, *entered into force* December 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, at Article 3(j).

[9] International Convenant on Civil and Political Rights, *adopted* December 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16), Articles 2(a), 13, 26; International Covenant on Economic, Social, and Cultural Rights; *adopted* December 16, 1966, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No.16), Article 2(2); American Convention on Human Rights, *signed* Nov. 22, 1969, OAS Official Records OEA/Ser. K/XVI/i.i, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970), Articles 22(7) 22(9), 24; The International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195, Articles 1, 2. The United States has signed but not yet ratified each of these treaties. Under Article 18 of the Vienna Convention on the Law of Treaties, *supra,* the United States is obliged not to defeat the object and purpose of these conventions prior to their entry into force. In addition, those international agreements to which the United States is not a party may nevertheless create or evidence a *customary* norm which is equally authoritative and equally binding. *North Sea Continental Shelf Cases,* [1969] I.C.J. Rep. 37. Other treaties which prohibit racial discrimination are

numerous international declarations and resolutions.[10] The most authoritative of these—the Universal Declaration of Human Rights[11]—sets forth in various forms a basic guarantee of rights and freedoms "without distinction of any kind, such as race . . . [or] national or social origin," *id.*, at Articles 2, 7, and 14. In international adjudication, the United States itself has invoked those provisions as evidence of the core human rights protected by international law.[12] The renunciation of official racial discrimination is reflected as well in the laws and constitutions of a vast majority of states,[13] and is conceived as the center-

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catalogued in Appendix E to *Amicus'* Brief in Support of Petition for Certiorari, filed herein on July 8, 1985, at 8a-9a.

[10] United Nations Declaration on the Elimination of All Forms of Racial Discrimination, *adopted* Nov. 20, 1963, G.A. Res. 1904, 18 U.N. GAOR Supp. (no. 15) 35, 36, U.N. Doc. A/5515 (1963); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted* by the Ninth International Conference of American States, held at Bogota, Columbia (1948), OEA/SER.L./V/I. 4 Rev. (1965), Articles II, XXCII; Declaration of Social Progress and Development, *adopted* Dec. 11, 1969, G.A. Res. 2542, 24 U.N. GAOR, Supp. (No. 30) 49, U.N. Doc. A/7630 (1969), Articles 1, 2; Declaration on the Promotion Among Youth of the Ideals of Peace, Mutual Respect and Understanding Between Peoples, *adopted* Dec. 7, 1965, G.A. Res. 2037, 20 U.N. GAOR, Supp. (No. 14) 40, U.N. Doc. A/6015 (1965), Principles 1, 3.

[11] G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

[12] Memorial of the United States, *The Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, [1980] I.C.J. Pleadings 181, n. 3 (January 1980).

[13] Santa Cruz, *Racial Discrimination*, U.N. Doc. E/CN. 41 Sub. 2/307/Rev. 1, 28 (1971). *See South West Africa Cases (Second Phase)*, [1966] I.C.J. 4, 299 (Tanaka, J., dissenting).

piece of contemporary human rights norms in the writings of international law scholars.[14]

Recognizing this consistent and universal condemnation of racial discrimination, the International Court of Justice has concluded that "the principles and rules concerning the basic rights of the human person, including protection from . . . racial discrimination," constitute an international obligation of all states. *Case Concerning The Barcelona Traction Light and Power Co., Ltd.*, [1970] I.C.J. Rep. 32. The International Court has also concluded that

> to establish . . . and to enforce distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin . . . constitutes a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the [U.N.] Charter.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, [1971] I.C.J. Rep. 57. The cumulative power of this international consensus has led the American Law Institute to include "systematic racial discrimination" in its authoritative catalogue of fundamental violations of customary international law. American Law

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[14] *See e.g.*, Lillich, "The Role of Domestic Courts in Enforcing International Human Rights Law," *International Human Rights Practice* (1984); McDougall, Lasswell & Chen, *Human Rights and World Public Order* 581-611 (1980). *See generally*, McKean, *Equality and Discrimination Under International Law* (1983); Henkin, *The Rights of Man Today* (1978).

Institute, *Restatement of Foreign Relations Law of the United States (Revised)* § 702(f) (1986).[15]

Thus, the prohibition against government-sponsored racial discrimination is firmly grounded in all of the traditional sources of customary international law set out by Mr. Justice Gray in *The Paquete Habana*, 175 U.S. 677, 700 (1900). That norm, stated in comprehensive and unqualified language, has never been limited in any authoritative way to demand some incontrovertible showing of individualized intent. Similarly, apparently unlike the Eighth and Fourteenth Amendments as read by the Eleventh Circuit, it admits no defense of degree. Although international law, like domestic law, will not redress trifles, racial discrimination of the type admittedly and repeatedly demonstrated in this case plainly falls within the customary international prohibition.

III. THE ELEVENTH CIRCUIT WAS REQUIRED TO CONSTRUE THE GEORGIA DEATH PENALTY STATUTE CONSISTENTLY WITH PERTINENT INTERNATIONAL LAW AND FAILED TO DO SO.

It is axiomatic that international law is part of the law of the United States and that, under the Supremacy Clause of the U.S. Constitution[16] as interpreted, it "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). This basic principle

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[15] The ALI adopted the revised *Restatement of Foreign Relations Law* at its meeting in Washington, D.C., on May 14-15, 1986.

[16] U.S. Const., Art. VI, Sec. 2.

has been accepted by this Court from the earliest days of the Republic, *Chisolm v. Georgia*, 2 Da. 419, 474 (1793) ("Prior ... to that period [the date of the Constitution], the United States had, by taking a place among the nations of the earth, become amenable to the law of nations"); *Ware v. Hylton*, 3 U.S. (3 Da.) 199, 281 (1796); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815). It has received fresh confirmation as recently as 1983 in Justice O'Connor's opinion for the Court in *First National City Bank v. Banco Para el Commercio Exterior de Cuba*, 103 S.Ct. 2591, 2598 (1983). The executive branch has reached the same conclusion. *See e.g.*, Op. Atty. Gen. 27 (1972): "The law of nations, although not specially adopted by the Constitution or any municipal act, is essentially part of the law of the land."[17]

The "law of nations" which the courts are directed to apply includes treaties to which the U.S. is a party, as well as customary international law or "international common law," which arises out of the practice of states acting in a particular manner because they feel themselves legally bound to do so. This state practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which

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[17] *See generally* American Law Institute, *Restatement (Revised) of the Foreign Relations Law of the United States*, § 131, Comment D ("The proposition that international law and agreements are law in the United States is addressed mainly to the courts. They are to apply international law or agreements as if their provisions were enacted by Congress."); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1560 (1984).

customary law rules are observed. *See North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 37. Unlike treaties which specify obligations only for their signatories, customary international is binding on all nations by virtue of membership in the international community. Consent is unnecessary, and *ad hoc* objection is unavailing.

As a matter of United States law, customary international law also creates enforceable rights and obligations for individuals. Thus, in *The Paquete Habana, supra*, this Court held that the customary international law of prize in time of war created rights in an individual whose boat had been seized in violation of those norms. *See also Respublica v. DeLongchamps*, 1 U.S. 119, 1 Dall. 111 (O. & T. Pa. 1784); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom., Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (l0th Cir. 1981). As *The Paquete Habana* teaches, when jurisdiction is clear, customary rights by their nature are enforceable by individuals in U.S. courts.[18] Any other disposition would erect the anomoly of a right without a remedy. Thus, in construing the Georgia death penalty statute and Petitioner's sentence thereunder, the Eleventh Circuit Court of Appeals was obliged to "ascertain[] and administer[]" international law, insofar as "questions of right" depend upon it. 175 U.S. at 700.

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[18] The self-execution doctrine, generally critical in treaty analyses, is irrelevant—indeed meaningless—in the context of customary international law, the intent of whose draftsmen necessarily defies discovery.

The argument here is not that international law in any sense displaces domestic law. It is rather that statutes enacted by Congress or the state legislatures "ought never to be construed to violate the law of nations, if any other possible construction remains." *Weinberger v. Rossi*, 456 U.S. 25, 33 (1982), quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See also*, *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); *Cook v. United States*, 288 U.S. 102 (1983); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). Thus, for example, the State of Georgia could not by statute suspend the customary laws of war or diplomatic immunity within its territory. So too is its implementation of racial discrimination in the imposition of capital punishment a forbidden departure from binding customary international norms.

At a minimum, this Court should reverse the decision below on the ground that the Eighth Amendment to the Constitution, as interpreted in light of international norms, prohibits death sentences tainted by racial discrimination. *See Rodriguez-Fernandez, supra*, 654 F.2d at 1388. In *Trop v. Dulles*, 356 U.S. 86, 101 (1958), this Court emphasized that the Eighth Amendment "must derive its meaning from evolving standards of decency that mark the progress of a maturing society." In determining the content of these "evolving standards," the Court noted that the vast majority of nations did not employ denaturalization as a punishment for desertion and concluded that such punishment would be "cruel and unusual" within the meaning of the Eighth Amendment. 356 U.S. at 102-103. Similarly, in *Coker v. Georgia*, 433 U.S. 584

(1977), this Court held that the imposition of the death penalty for the rape of an adult woman was "cruel and unusual," referring explicitly to international standards. 433 U.S. at 596, n. 10. The Court recently turned again to the "climate of international opinion" in determining that the death sentence was cruel and unusual when imposed on a defendant who had not intended to kill his victim. *Enmund v. Florida*, 458 U.S. 782, 796 n. 22 (1982).

Plainly then, customary international standards are entitled to persuasive weight under the decisions of this Court. As demonstrated above, there is no customary norm more powerful or well-established than the prohibition of government-sponsored racial discrimination. Under *Trop*, *Coker*, and *Enmund*, therefore, petitioner's Eighth Amendment claim should have been assessed in this light.

Obviously, the *en banc* court below made no attempt to discharge its burden under either *The Paquete Habana* to apply international law or *Trop* and its progeny to consult international standards in determining the "evolving standards of decency" protected by the Eighth Amendment. The *en banc* court did not address the relevant norms of international law as incorporated into federal common law, nor did it address whether the racial disparities alleged by Petitioner fall within the scope of the international prohibition. Instead, on the issue of discrimination, the *en banc* court of appeals contented itself with considering only the contours of domestic law. The court's apparent neglect of the peremptory norm of international law prohibiting racial discrimination cannot be squared with this Court's consistent adherence to the law of nations as providing the rule of decision, whenever a

litigant's rights may be framed in its terms. In short, the *en banc* court's failure to assess international law issues raised by its acceptance that the showing of discrimination was valid constitutes error which should be reversed by this Court.

CONCLUSION

"Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). This is such a case. Data collected by Petitioner and by *Amicus* in parallel international proceedings demonstrate that unequal sanctions are attached to the taking of white and black lives in the State of Georgia. Although the structure and precise results of these studies may vary, the conclusion does not. That the court below was willing to concede the discriminatory impact makes its affirmation of Petitioner's sentence all the more erroneous. In addition, the *en banc* court's failure to consider the international law issues relevant to this case violates the Supremacy Clause of the Constitution as interpreted, and ignores the decisions of this Court which establish the fundamental role of international law in the law of the United States and its persuasive role in interpreting the Eighth Amendment.

For all of these reasons, *Amicus* respectfully urges this Court to reverse the decision of the court of appeals below.

Respectfully submitted,

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APPENDIX

APPENDIX

AFFIDAVIT OF PROFESSOR WILLIAM BOWERS

I am a sociologist with particular training in statistics and computer applications to sociology. I graduated from Washington and Lee University in 1957 and received my doctorate in sociology in 1966 from Columbia University. I am presently a professor of sociology at Northeastern University, Boston, Massachusetts, and Director of that University's Center for Applied Social Research.

Since approximately 1972, I have been engaged in research, study, and writing on the use of the death penalty in the United States. I am the author of numerous articles on the subject and of the book *Executions in America*, published in 1974.

Together with the Assistant Director here at the Center, Glenn L. Pierce, and others, I have supplied the figures and statistics on race-victim death sentencing disparaties contained in appendices A and B of this complaint. These figures are accurate to the best of our abilities and reflect sustained research and the use of widely-accepted statistical methods.

I believe, on the basis of my research and analysis, that the broad pattern of race-victim death sentencing disparities complained of in the foregoing document remain unremedied by state or federal authorities and therefore continue today.

(signed) William Bowers

Professor William Bowers

SS: Commonwealth of Massachusetts
County of Suffolk

Subscribed and sworn to before me this 11th day of April, 1980.

(signed) Philip C. Boyd

Notary Public

My Commission Expires:
Nov. 28, 1980

SEAL

FLORIDA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	*Estimated Number of Offenders*[a]	*Persons Sentenced to Death*	*Probability of a Death Sentence*
White	2265	72	.032
Black	2606	61	.023
Race of Victim			
White	2439	122	.050
Black	2432	11	.005
Offender/Victim Racial Combinations			
Black Kills White	286	48	.168
White Kills White	2146	72	.034
Black Kills Black	2320	11	.005
White Kills Black	111	0	.000
All Offenders	4871	133	.027

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a]The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

GEORGIA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	*Estimated Number of Offenders*[a]	*Persons Sentenced to Death*	*Probability of a Death Sentence*
White	1082	41	.038
Black	2716	49	.018
Race of Victim			
White	1265	76	.060
Black	2529	14	.005
Offender/Victim Racial Combinations			
Black Kills White	258	37	.143
White Kills White	1006	39	.039
Black Kills Black	2458	12	.005
White Kills Black	71	2	.028
All Offenders	3798	90	.024

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1975 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

[a]The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

TEXAS

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR CRIMINAL HOMICIDE BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	*Estimated Number of Offenders*[a]	*Persons Sentenced to Death*	*Probability of a Death Sentence*
White	3771	38	.010
Black	2940	29	.010
Race of Victim			
White	3964	71	.018
Black	2740	2	.001
Offender/Victim Racial Combinations			
Black Kills White	344	27	.078
White Kills White	3616	37	.010
Black Kills Black	2597	2	.007
White Kills Black	143	0	.000
All Offenders	6711	73	.011

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

[a]The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

FLORIDA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN FLORIDA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	*Estimated Number of Offenders*[a]	*Persons Sentenced to Death*	*Probability of a Death Sentence*
White	307	54	.176
Black	251	50	.199
Race of Victim			
White	432	97	.224
Black	122	7	.057
Offender/Victim Racial Combinations			
Black Kills White	136	41	.301
White Kills White	296	54	.182
Black Kills Black	115	7	.061
White Kills Black	7	0	.000
All Offenders	558	104	.186

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reports Program, Department of Law Enforcement, Tallahassee, Florida; (3) persons sentenced to death from January 1973 through December 1977, supplied by Citizens Against the Death Penalty, Jacksonville, Florida.

[a]The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by victim-based adjustment factor to correct for undercoverage. The adjustment factor 3.484 equals the number of homicide victims from January 1973 through December 1977 (sources: 1, 2) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

GEORGIA

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN GEORGIA FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	*Estimated Number of Offenders*[a]	*Persons Sentenced to Death*	*Probability of a Death Sentence*
White	196	37	.189
Black	338	42	.124
Race of Victim			
White	316	69	.218
Black	218	10	.046
Offender/Victim Racial Combinations			
Black Kills White	134	34	.254
White Kills White	183	35	.191
Black Kills Black	205	8	.039
White Kills Black	13	2	.154
All Offenders	534	79	.148

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from April 1973 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Criminal Activity Reporting Unit, Georgia Bureau of Investigation, Georgia Crime Information Center, Atlanta, Georgia; (3) Vital Statistics tabulations on willful homicides from April 1973 through December 1977, supplied by the Office of Health Services Research and Statistics, Division of Physical Health, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia; (4) Persons sentenced to death from April 1973 through December 1977, supplied by Georgia Committee Against the Death Penalty, Atlanta, Georgia.

[a]The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 4.453 equals the number of homicide victims from April 1973 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).

TEXAS

PROBABILITY OF RECEIVING THE DEATH SENTENCE FOR FELONY-TYPE MURDER BY RACE OF OFFENDER AND VICTIM IN TEXAS FROM THE EFFECTIVE DATE OF THE POST-*FURMAN* STATUTE THROUGH 1977

Race of Offender	*Estimated Number of Offenders*[a]	*Persons Sentenced to Death*	*Probability of a Death Sentence*
White	411	34	.083
Black	294	27	.092
Race of Victim			
White	551	63	.114
Black	151	2	.013
Offender/Victim Racial Combinations			
Black Kills White	173	25	.144
White Kills White	378	34	.090
Black Kills Black	121	2	.016
White Kills Black	30	0	.000
All Offenders	705	61	.087

Data Sources: (1) Supplementary Homicide Reports on criminal homicide data from January 1974 through December 1976, supplied by the Uniform Crime Reporting Program, Federal Bureau of Investigation, United States Department of Justice, Washington, D.C.; (2) Supplementary Homicide Reports on criminal homicide data for 1977, supplied by the Uniform Crime Reporting Bureau, Texas Department of Public Safety, Austin, Texas; (3) Vital Statistics records on willful homicides from January 1974 through December 1977, supplied by the Bureau of Vital Statistics, Texas Department of Health, Austin, Texas; (4) persons sentenced to death from January 1974 through December 1977, supplied by the Office of Court Administration, The Supreme Court of Texas, Austin, Texas.

[a]The estimated number of offenders for a given category is obtained by multiplying the reported number of offenders in that category for the years 1976, 1977 (sources: 1, 2) by a victim-based adjustment factor to correct for undercoverage. The adjustment factor 2.473 equals the number of homicide victims from January 1974 through December 1977 (source: 3) divided by the number of homicide victims in the years 1976, 1977 (sources: 1, 2).